APPEAL NO. 93512

The appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On May 13, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon were: "1. Whether injury occurred in course and scope of employment? 2. Whether injury was reported to the Employer within 30 days? 3. Whether the Claimant has been disabled to such an extent he could not or cannot work." The hearing officer determined that claimant had sustained an injury in the course and scope of employment, that claimant had timely notified the employer of his injury and that claimant's disability had not ended. Appellant, carrier herein, contends that certain of the hearing officer's findings and conclusions were in error and generally alleges no evidence, or in the alternative insufficient evidence, to support the decision. Carrier requests that we reverse the hearing officer's decision and order and render a decision in its favor. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant was employed by TW(no relation to claimant) (employer)., employer herein, on December 1, 1992, as a drywall worker. Claimant testified that on (date of injury), at a building project, as he turned a corner he was momentarily blinded by some welding nearby, hit his head on a pipe and was knocked to the ground on his buttocks. Claimant said that he was wearing a hard hat and a tool belt around his waist that weighed approximately 40 pounds. Claimant stated he immediately got up, told a coworker, Johnny Flores (JF) about the incident and about 30 minutes later told (Mr. V), claimant's supervisor, that he "had hit my head around the corner there on a pipe and knocked me to the ground, but that I was all right." Claimant continued to work until December 28, 1992, when he was told he was being laid off, apparently, according to Mr. V, because the project was almost done and there was no more funding. Mr. V testified he had recommended claimant to a painting contractor and a plumbing company. According to Mr. V, the plumbing contractor apparently offered claimant a job but claimant "didn't want to work for $5 an hour." Claimant testified that the reason he had continued to work for the employer after December 16th was because he needed the work. The claimant testified on cross-examination that after being laid off, he played pool "trying to . . . keep myself limbered . . . ." There is some testimony that claimant tried to see a doctor in early January, but was unable to do so because the employer had not approved payment, but claimant is very uncertain on dates. An Employee's Notice of Injury (TWCC-41) filed by claimant's wife shows as the date lost time began as 1-15-93. Claimant testified that his back had been getting progressively worse and that he was able to see (Dr. R) at Scott and White Clinic on January 26, 1993.

Mr. V testified that he was claimant's supervisor and does not remember claimant telling him about the incident in question although he concedes that if claimant had said he was not hurt or was okay he would not have filled out an injury report. Mr. V is certain that

claimant had not reported to him that he was injured. Mr. V testified that there may have been an incident on (date of injury), but he could not recall the details. Employer's secretary testified that she completed an Employer's First Report of Injury on February 11, 1993.

Dr. R in a progress note dated 2-8-93, diagnosed claimant with "[l]ow back pain with mild sciatica" prescribed "[b]ach (sic) Rest/Moist Heat." A note by Dr. R on 2-23-93 would indicate not much change. Claimant was referred to (Dr. A) by note dated 3-17-93. In Dr. A's examination of 3-13-93, Dr. A notes claimant's previous history of back problems and prior workers' compensation claims. Dr. A does note "[h]owever, his pain complaints are different now, and although physical examination is benign, his history would be consistent with an L5 radicular process." On 3-24-93 claimant had a negative CT scan of the lumbar spine. An MRI scan of claimant's hips on 4-1-93 showed "[f]indings in the proximal left femur highly suggestive of early avascular necrosis." Dr. A in a 3-25-93 report indicated "bed rest was helpful" and that claimant "needs to slowly begin to work on getting back to normal and getting back to work." Dr. A recommended claimant ". . . avoid using the crutches." Dr. A by report of 4-2-93 referred claimant to (Dr. P). Dr. P, on 4-12-93, had the impression of "[e]arly avascular necrosis of the left hip of idiopathic etiology." Dr. P performed surgery in the nature of a "core decompression of the left femoral head" on 4-16-93. In a note of April 27, 1993, Dr. P reports claimant two weeks post surgery and "reports symptomatic improvement in his inguinal pain." Claimant has apparently been released back to Dr. R for follow up care. Dr. R in a medical note dated May 11, 1993, stated claimant has been unable to work since February 8, 1993.

Claimant at the CCH submitted a psychological report from (Dr. E) dated 1989. This report showed claimant attended school "to the 8th or 9th grade" but apparently "never learned to read and write." IQ testing placed claimant in "the 60-70 range." Claimant at the hearing testified that he has difficulty understanding and remembering things and cannot read or write.

Carrier at the hearing submitted one group of medical reports which appeared to largely duplicate claimant's medical reports. In addition carrier submits a deposition upon written questions for (Dr. V) regarding claimant's previous injury when he was hit by a forklift in March of 1990. Carrier also submits a deposition upon written questions for (Dr. S) regarding an injury claimant suffered in 1987.

The hearing officer found claimant sustained an on-the-job injury on (date of injury), and reported that injury to Mr. V on that date. He further found claimant continued to work until he was laid off on December 28, or 29, 1992, and that claimant had a history of chronic back pain and left leg numbness from 1987 through September 30, 1992, due to work related injuries. The hearing officer, in his findings, recited the medical care claimant received and concluded that claimant sustained an injury in the course and scope of employment on (date of injury), timely notified the employer of the job related injury, and has

sustained disability on and subsequent to February 8, 1993, to the date of the CCH.

Carrier disputes all findings and conclusions which support the decision of the hearing officer and states:

> there is no evidence whatsoever to support the foregoing findings of fact, or in the alternative, the foregoing findings of fact are so against the great weight and preponderance of the evidence as to be clearly erroneous. Likewise, the conclusions of law are in error because the factual basis for the conclusions have no support in the evidence adduced during the contested case hearing.

Carrier strenuously contests that claimant sustained an injury and, if he did, contends that the injury was not reported. Carrier at length recites prior medical evidence of prior injuries claimant had suffered and contends that claimant never fully recovered from those problems. Carrier is adamant that there is "absolutely no medical evidence of a causal connection between the incident of (date of injury), and the [claimant's] condition in his left hip." Carrier contends claimant's complaints in previous injuries and this injury were "identical" and claimant had never recovered from his previous injuries. Carrier also argues the facts as to whether the injury was reported to Mr. V as alleged.

All of the carrier's arguments revolve around factual determinations on whether an accident happened as claimant described it, whether the injuries sustained in that accident were the same, or were different or were an aggravation of a preexisting condition and whether the injury was promptly reported to Mr. V as claimant alleged. While one could reasonably differ as to the answers to those questions based on the evidence and testimony, it is clear from our perspective that those are factual determinations within the prerogative of the trier of fact. The challenged findings will be upheld unless the Appeals Panel determines that the evidence is so weak or that the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App. - Houston 1988, no writ); Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App. - San Antonio 1983, writ ref'd n.r.e.). In this regard, the hearing officer is the sole judge of the weight of the evidence and the credibility to be given the evidence. Article 8308-6.34(e); Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. App. - Amarillo 1978, no writ); Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. App. - Fort Worth 1947, no writ). It is within the province of the hearing officer as the sole judge of the credibility of the witnesses and the weight to be given their testimony to resolve the conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. App. - Amarillo 1974, no writ).

That the injured party is the only witness to an injury does not defeat a valid claim. His testimony may be believed by the trier of fact and the testimony of others may be

rejected. Texas Employers Insurance v. Thompson, 610 S.W.2d 208 (Tex. Civ. App. - Houston, 1981, no writ). When the claimant's testimony is that of an interested party, his testimony raises an issue of fact for the trier of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. app. - Amarillo 1978, no writ), and the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in the light of the other testimony in the record. Burelsmith, *supra*. Here the hearing officer believed the claimant's version, believed that his previous injuries had been resolved, believed the pain was different after this injury than the pain in previous injuries and believed that he had reported the accident to Mr. V. Mr. V concedes that the incident could have happened but that he did not complete an injury report because the claimant said he was "Okay." Nonetheless, the employer, through Mr. V, if claimant is to be believed as the hearing officer obviously did, had the prerequisite notice of "the general nature of the injury and the fact that it is job related." DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). As the carrier noted DeAnda stands for the proposition "that great liberality should be indulged in determining the sufficiency and scope of such notices . . . ." Citing Lewis v. American Surety Co., 143 Tex. 286, 184 S.W.2d 197 (1944). Courts have held that evidence can present a fact issue as to whether the employer had facts that would lead a reasonable person to conclude that a compensable injury had been sustained by an employee. Miller v. Texas Employer's Insurance Association, 488 S.W.2d 489 (Tex. Civ. App. - Beaumont 1972, writ ref'd n.r.e.) In Miller, as in the instant case, the employee after falling stated he didn't think he was hurt and that he didn't think he needed to see a doctor. Based upon the hearing officer's factual determination, that would appear to be the situation in this case. *See* Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1992, and Texas Workers' Compensation Commission Appeal No. 93316, decided May 28, 1993. The sufficiency and scope of what is "notice" of injury under the 1989 Act should he liberally determined because the purpose of notice is to allow prompt investigation of facts underlying an injury. Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993 citing DeAnda, *supra*. Applying the rule of "liberal construction" in DeAnda we find that when claimant reported the incident to Mr. V and Mr. V had the opportunity to further investigate the incident, this comprised the notice required by the 1989 Act.

In sum, we find there is sufficient evidence to support the hearing officer's determinations and therefore there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside his decision. In re

King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Gary L. Kilgore
Appeals Judge